

Jun 11, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARSHALL L. STORY,

Plaintiff,

v.

DR. JEFFERY MAPLE,
Doctor/Medical Provider NaphCare;
KYRA, Nurse; AMANDA SPAYDE,
RN,

Defendants.

NO: 2:18-CV-185-RMP

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND
DISMISSING REMAINING
DEFENDANTS FOR FAILURE TO
STATE A CLAIM

BEFORE THE COURT is a motion by Defendant Amanda Spayde, RN
("Nurse Spayde") to dismiss Plaintiff Marshall Story's complaint with prejudice
based on Plaintiff's alleged failure to include any allegations of Nurse Spayde's
personal participation in the deprivation of constitutionally protected rights that
Plaintiff claims. ECF No. 29; *see also* ECF No. 11 (Complaint). Plaintiff did not

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1 respond to Defendant’s Motion to Dismiss, although he untimely filed a Second
2 Amended Complaint after Defendant moved to dismiss.¹

3 **BACKGROUND**

4 ***Procedural History***

5 Plaintiff claims a violation of his constitutional rights during his pretrial
6 detention at the Spokane County Jail in Spokane, Washington. Plaintiff is
7 proceeding pro se and in forma pauperis and pursues his civil rights claim under 42
8 U.S.C. § 1983. Plaintiff asserts that he suffers from chronic, serious pain following
9 a neck injury and surgery in 2015. ECF No. 11 at 5. In the original Complaint,
10 Plaintiff named as Defendants John McGrath, then-Director of the Spokane County
11 Jail, and “Amanda[,]” a NaphCare nurse, as well as “John/Jane Doe #1[,]” Medical
12 Director of NaphCare and “Doe, Jane #2[,]” a NaphCare provider. *Id.* at 3–4.

13 The Court screened Plaintiff’s Complaint on August 20, 2018, and determined
14 that the claims against named Defendant McGrath were appropriately dismissed, as

15 ¹ Plaintiff also filed approximately 23 “declarations,” which in general provide
16 updates, from Plaintiff’s perspective, regarding the medical treatment that he was
17 or was not receiving while at the Spokane County Jail. Given the Court’s order
18 extending Plaintiff’s opportunity to file a response to Defendant’s motion to
19 dismiss, ECF No. 34, the Court does not construe his declarations as responses to
20 Defendant’s Motion to Dismiss.
21

1 Plaintiff had not alleged any facts from which the Court could infer that Defendant
2 McGrath was aware of any unconstitutional behavior or that he had caused any
3 constitutional violations through establishment of a custom or policy. ECF No. 9 at
4 4. The Court further found that, “[l]iberally construing Plaintiff’s allegations
5 regarding the lack of medical care he has received at the Spokane County Jail, the
6 Court finds a response from Defendant ‘Nurse Amanda’ is required under 42 U.S.C.
7 § 1997e(g)(2).” *Id.* at 9. The Court directed service upon Defendant “Nurse
8 Amanda” by the U.S. Marshal. *Id.* at 7. The Court informed Plaintiff that he could
9 request service upon the John/Jane Doe Defendants once he identified those
10 defendants through formal discovery or otherwise. *Id.* at 6.

11 After the U.S. Marshal served the Complaint on Nurse Spayde, Plaintiff filed
12 an Amended Complaint on October 19, 2018. ECF No. 26. Plaintiff’s Amended
13 Complaint identified Doe Defendant #1 as Dr. Jeffery E. Maple and Doe Defendant
14 #2 as “Kyra,” a NaphCare nurse. ECF No. 26. Plaintiff’s statement of his claims
15 and factual allegations were identical to the language of Plaintiff’s original
16 Complaint. *Id.* Defendant moved to dismiss Plaintiff’s Complaint shortly thereafter.
17 ECF No. 29.

18 On December 19, 2018, Defendant filed a “First Amended Complaint,” which
19 the Court refers to as Plaintiff’s Second Amended Complaint since it is the third
20 Complaint filed by Plaintiff in this matter. ECF No. 40. The Second Amended
21 Complaint again identified Doe Defendant #1 as Dr. Jeffery E. Maple and changed

1 the name of formerly Doe Defendant #2, a NaphCare nurse, to “Kara.” *Id.* at 3–4.

2 The Second Amended Complaint supplemented and modified the allegations against
3 Defendants. Rather than reiterating Plaintiff’s allegations regarding his medical
4 conditions and the medical treatment he had received prior to his incarceration at
5 Spokane County Jail, the Second Amended Complaint refers to the preceding
6 Complaints for those allegations. *Id.* at 5. Since filing the Second Amended
7 Complaint, Plaintiff was transferred from the Spokane County Jail to a U.S. Bureau
8 of Prisons facility. ECF No. 55.

9 The Second Amended Complaint, ECF No. 40, was not timely. *See* Fed. R.
10 Civ. P. 15(a) (requiring leave of court or written consent of the opposing party to
11 amend a complaint after the period for amendment as a matter of right expires). It
12 also impermissibly referred to a previous complaint for a portion of the allegations
13 rather than repeating the allegations in the Second Amended Complaint and stating
14 its claims completely without reference to any prior pleading. *See Barnes v. Sea*
15 *Haw. Rafting, LLC*, 889 F.3d 517, 531 (9th Cir. 2018) (recognizing that an amended
16 complaint supersedes the original). Nevertheless, the Court liberally construes
17 Plaintiff’s Second Amended Complaint, ECF No. 40, as a responsive filing to
18 Defendant’s Motion to Dismiss and considers both whether the deficiencies in
19 Plaintiff’s Amended Complaint warrant dismissal and whether Plaintiff’s Second
20 Amended Complaint, ECF No. 40, cures any deficiencies. *See Porter v. Ollison*,

1 620 F.3d 952, 958 (9th Cir. 2010) (“Prisoner pro se pleadings are given the benefit
2 of liberal construction.”).

3 ***Factual Allegations***

4 As alleged by Plaintiff, Plaintiff sustained a severe neck injury while
5 incarcerated by the State of Washington in 2015. ECF No. 26 at 5. He underwent
6 major surgery on his spine as a result and received morphine and two other
7 medications during his post-surgical recovery. *Id.* at 6. After Plaintiff’s release
8 from state custody in December 2015, he continued his treatment and rehabilitation
9 by receiving care at a medical clinic in Spokane. *Id.* During that time, Plaintiff
10 continued on a prescribed medication regimen for pain management. *Id.* Plaintiff
11 represents that he was told that he would “have to have vertebrae C-5, C-6, and C-7
12 replaced as the weight of the titanium [inserted in his first surgery] presses down and
13 grinds from above.” *Id.* at 6.

14 Plaintiff recounts that he was arrested and taken to the Spokane County Jail on
15 May 20, 2018. ECF No. 26 at 6. In Plaintiff’s Complaint and Amended Complaint,
16 he alleged that the NaphCare “medical staff” at the jail all showed deliberate
17 indifference to his serious medical needs when they “refused to treat [his] condition,
18 . . . denied all medications [he is] on, and refused to obtain [his] medical record from
19 [the medical clinic in Spokane] or [the Washington Department of Corrections].” *Id.*
20 at 6. Plaintiff further alleged that the medical staff “refused [his] requests for a neck
21 brace, a pillow, and any medications” and “housed [him] upstairs” despite his

1 equilibrium being “off.” *Id.* at 6–7. In the Second Amended Complaint, Plaintiff
2 supplemented these general allegations by recounting specific instances that Plaintiff
3 alleges amount to deliberate indifference by each Defendant.

4 Nurse Spayde

5 Plaintiff alleges that Nurse Spayde examined Plaintiff on May 20, 2018. ECF
6 No. 40 at 3. He alleges that she told him that he needed to fill out release of
7 information forms that she did not have with her and did not send up to him “later.”
8 *Id.* He further alleges that she “ignored [him] when she would walk by [his] cell.”
9 *Id.*

10 Dr. Maple

11 Plaintiff recounts that Dr. Maple examined Plaintiff on June 28, 2018. ECF
12 No. 40 at 3. Dr. Maple allegedly informed Plaintiff that:

13 this was a too complex issue that his medical degree don’t [sic] cover
14 so he had to referre [sic] me to a neuro-surgeon, which at this time
15 [Plaintiff] was placed on the wrong specialist list for consult and it took
16 Naphcare employees 3 months to notice this and place me on the correct
17 list thanks to P.A. Danae who noticed the problem and corrected it but
18 came in late October to tell me that the neuro-surgeon wanted a
19 Magnetic Resonance Imaging (MRI) before he sees me which delayed
20 my appointment even later.

21 *Id.*

Plaintiff alleges that an MRI scan on November 9, 2018, “revealed further
damage to [his] neck that now need [sic] to be operated on and attempt [sic] to fix by

1 fusing more of my neck together—this may have been avoided if I was put on the
2 correct specialist list back in June when I first seen [sic] Dr. Maple.” *Id.* at 3–4.

3 Nurse Kara

4 Plaintiff does not recount any specific instance in which Nurse Kara examined
5 or treated Plaintiff. Rather, he alleges generally that:

6 Nurse Kara and above stated other employees of Naphcare—especially
7 Nurse Amanda Spayde, Dr. Jeffery E. Maple [sic] acts of wrong
8 referrals and denial [sic] to correct mistake was causing harm and undue
9 pain & suffering. Nurse Amanda and Nurse Kara blantly [sic] denied
10 Plaintiff any relief of pain or suffering in any way at all thus making
11 them all cause and personally participated in causing plaintiff’s pain &
12 suffering[.]

13 ECF No. 40 at 4.

14 **LEGAL STANDARD**

15 ***Standards for Dismissal***

16 To avoid dismissal under Federal Rule of Civil Procedure 12(b)(6), a plaintiff
17 must state “enough facts to state a claim for relief that is plausible on its face.” *Bell*
18 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible if the
19 court can reasonably infer that the defendant is liable under the law for the acts or
20 omissions that are alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although
21 the Court assumes Plaintiff’s factual allegations to be true at this stage in the case,
conclusory allegations or unreasonable inferences may not overcome a Rule 12(b)(6)
motion to dismiss. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017).

The Court’s review is limited to the allegations contained in the complaint and any

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1 exhibits that are incorporated by reference and attached to the complaint. *Id.* at 679
2 n. 11.

3 Moreover, a district court, on its own initiative, must dismiss a complaint, or
4 any portion thereof, in which an inmate or detainee has raised claims that are legally
5 frivolous, malicious, fail to state a claim upon which relief may be granted, or that
6 seek monetary relief from a defendant who is immune from relief. *See* 28 U.S.C. §
7 1915A(b)(1), (2); 28 U.S.C. § 1915(e)(2)(B)(i)–(iii).

8 ***Section 1983***

9 An individual government employee is not liable under section 1983 unless
10 that individual’s own actions caused the alleged constitutional deprivation. *OSU*
11 *Student Alliance v. Ray*, 699 F.3d 1053, 1069 (9th Cir. 2012). An individual
12 government employee “causes” a constitutional deprivation when she (1) “does an
13 affirmative act, participates in another’s affirmative acts, or omits to perform an act
14 which [she] is legally required to do that causes the deprivation”; or (2) “set[s] in
15 motion a series of acts by others which the [defendant] knows or reasonably should
16 know would cause others to inflict the constitutional injury.” *Lacey v. Maricopa*
17 *Cty.*, 693 F.3d 896, 915 (9th Cir. 2012) (en banc) (internal quotation omitted).

18 ***Fourteenth Amendment***

19 The Fourteenth Amendment’s due process clause, rather than the cruel and
20 unusual punishment prohibition under the Eighth Amendment, governs the treatment
21 and conditions of confinement for pretrial detainees. *Gordon v. County of Orange*,

1 888 F.3d 1118, 1124 (9th Cir. 2018). Courts evaluate such claims according to an
2 objective deliberate indifference standard. *Id.* To succeed in a claim for deficient
3 medical care, a pretrial detainee plaintiff must show with respect to each individual
4 defendant:

- 5 (i) The defendant made an intentional decision with respect to the
conditions under which the plaintiff was confined;
- 6 (ii) Those conditions put the plaintiff at substantial risk of suffering
serious harm;
- 7 (iii) The defendant did not take reasonable available measures to
8 abate that risk, even though a reasonable official in the
circumstances would have appreciated the high degree of risk
involved—making the consequences of the defendant’s conduct
9 obvious; and
- 10 (iv) By not taking such measures, the defendant caused the plaintiff’s
injuries.

11 *Gordon*, 888 F.3d at 1125.

12 Whether a defendant’s conduct is objectively unreasonable “turns on the facts
13 and circumstances of each particular case.” *Kingsley v. Henrickson*, 135 S. Ct. 2466
14 (2015) (internal quotation omitted). The “mere lack of due care by a state official
15 does not deprive an individual of life, liberty, or property under the Fourteenth
16 Amendment.” *Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (internal
17 quotation omitted). Therefore, a plaintiff must “prove more than negligence but less
18 than subjective intent—something akin to reckless disregard.” *Id.*

19 Plaintiff emphasizes in his Second Amended Complaint that this Court is
20 “obligated to draw only reasonable factual inferences in the plaintiff’s favor.” ECF
21 No. 40 at 5. However, allegations in a complaint are entitled to a presumption of

1 truth only if they go beyond reciting the elements of a cause of action and
2 sufficiently allege the underlying facts to “give fair notice and to enable the
3 opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th
4 Cir. 2011).

5 Plaintiff’s meager allegations with respect to each Defendant do not address
6 the essential elements of a claim of constitutionally deficient medical care. Plaintiff
7 does not allege with particularity what intentional decision any Defendant made to
8 place Plaintiff in conditions that put Plaintiff at risk of suffering or serious harm.
9 *See Gordon*, 888 F.3d at 1125. Plaintiff does not allege any particular measures that
10 Defendants deliberately failed to take regarding pain and medication management;
11 nor does Plaintiff allege how any such failure caused injuries for Plaintiff. For
12 instance, Plaintiff does not allege any specific instance of either Defendant Spayde
13 or Defendant Kara refusing to issue Plaintiff medication. Rather, he alleges only
14 that Defendant Spayde requested he fill out a release of information form that she
15 did not have on hand at the time and that she ignored Plaintiff when she passed his
16 cell. Plaintiff does not allege any specific behavior by Defendant Kara.

17 With respect to Defendant Maple, Plaintiff alleges only that he referred
18 Plaintiff to a neurosurgeon, but that Plaintiff was placed on the incorrect referral list
19 for three months, without specifying whether Defendant Maple is alleged to have
20 made that mistake. Even if Plaintiff had alleged with particularity that any of the
21 Defendants individually participated in placing Plaintiff on an incorrect referral list

1 that delayed Plaintiff's visit to a neurosurgeon or Plaintiff's MRI, those actions do
2 not surpass mere negligence. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)
3 (deliberate indifference "describes a state of mind more blameworthy than
4 negligence"); *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005) (mere
5 negligence is not deliberate indifference). Therefore, the Court finds that Plaintiff's
6 allegations do not set forth a plausible avenue to relief on the basis of deliberate
7 indifference to his medical needs.

8 ***Futility***

9 In the Ninth Circuit, a pro se litigant should be afforded an opportunity to
10 amend his complaint, unless the Court determines that the pleading could not be
11 cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.
12 2000) (en banc). However, the Court need not grant a plaintiff leave to amend when
13 it is apparent that amendment would be futile. *James v. Giles*, 221 F.2d 1074, 1077
14 (9th Cir. 2000).

15 Plaintiff's Amended Complaint and Second Amended Complaint, read
16 together and interpreted liberally, do not state a claim for relief under section 1983
17 against any of the three remaining Defendants. Plaintiff has filed three complaints in
18 this action, with the Second Amended Complaint making allegations and arguments
19 in an effort to survive Defendant Spayde's motion to dismiss. Plaintiff's pretrial
20 detention ended while Defendant's Motion to Dismiss was pending. The Court finds
21 no basis upon which to conclude that Plaintiff could utilize an opportunity for a third

1 amendment to add any specific facts to cure the deficiencies in his claims.

2 Therefore, the Court finds that granting leave to amend would be futile.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Defendant's Motion to Dismiss, **ECF No. 29**, is **GRANTED**.

5 2. Plaintiff's Second Amended Complaint is **dismissed with prejudice**.

6 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
7 Order, enter judgment of dismissal, provide copies to Plaintiff Marshall Story at his
8 most recent address and to counsel, and **close the file** in this matter.

9 **DATED** June 11, 2019.

10
11 *s/ Rosanna Malouf Peterson*
12 ROSANNA MALOUF PETERSON
13 United States District Judge
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